Supreme Court of the United States

No. 156.

OCTOBER TERM, 1939.

LAWRENCE YEARSLEY AND GEORGE YEARSLEY,
PETITIONERS,

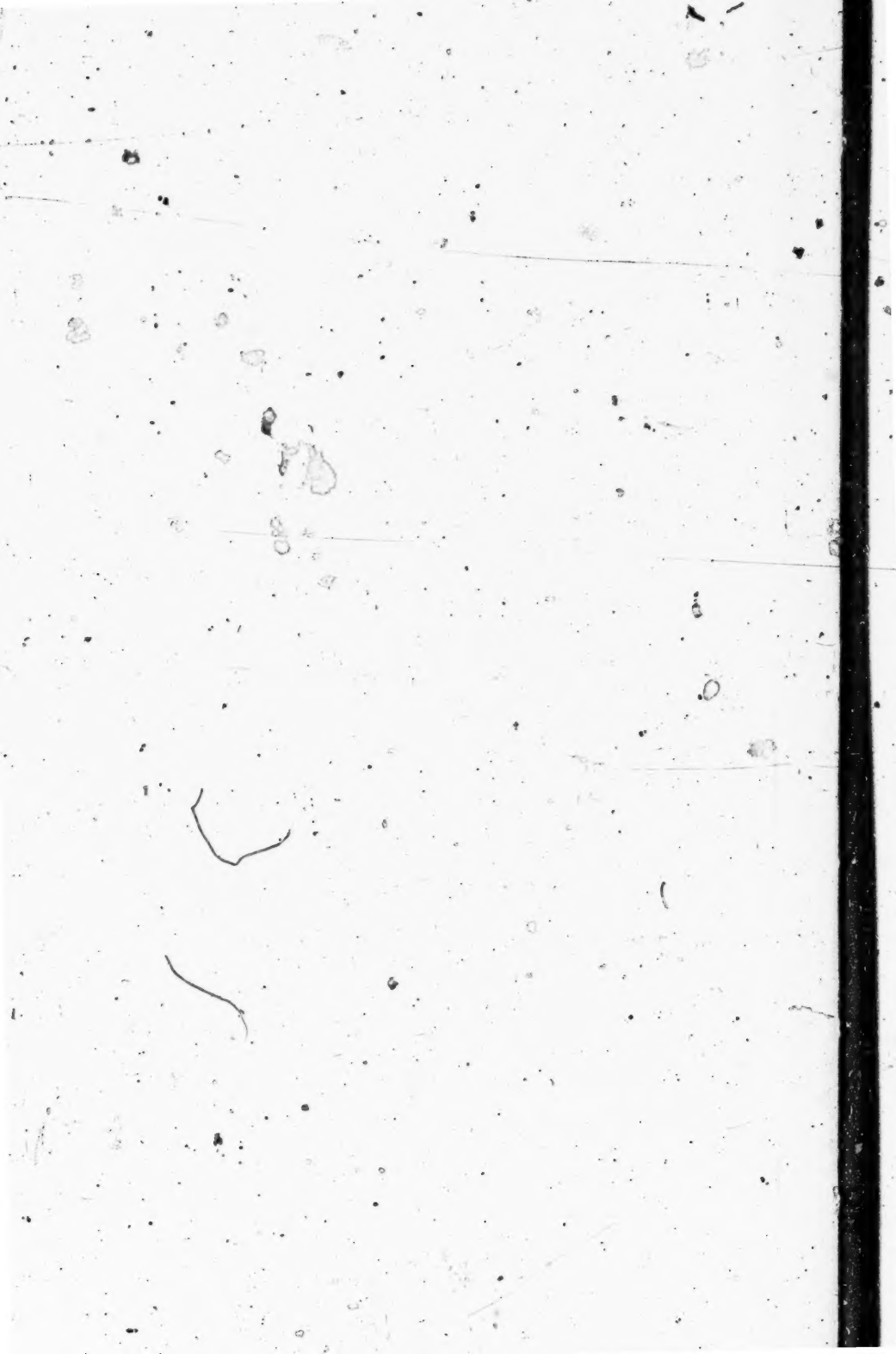
VS.

W. A. ROSS CONSTRUCTION COMPANY, A
CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

CLAY C. ROGERS,
Counsel for Respondent.



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BRIEF OF RESPONDENT.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 103 F. (2d) 589.

Question Presented.

Whether a taking of property within the Fifth Amendment to the Constitution of the United States, or merely a consequential damage incident to a public undertaking, which must be borne without any right to compensation, resulted from the construction of dikes in the bed of the Missouri River (a navigable river) in aid of navigation and under the direction of the United States, which merely caused a diversion of the current or shifting of the channel, which eroded accretions and deposits theretofore made by the river along plaintiff's fast land.

STATEMENT.

The action is at law for damages for the alleged destruction of accreted lands on the west side of the Missouri River in Otoe County, Nebraska. The respondent, under Government contracts and Government direction and supervision, constructed dikes on the east or Iowa side of the river which, gradually and over a period of about three years, so diverted the current of the river from the Iowa side to the Nebraska side that part of the petitioners' accreted land was eroded.

On January 21, 1927, Congress passed an act (69th Congress, Chapter 47, page 1010) authorizing the construction, repair and preservation of certain public works on rivers and harbors. The exact language of the statute is as follows:

> "Missouri River, between Kansas City, from the upper end of Quindaro Bend and Sioux City, Iowa, in accordance with the report of the Board of Engineers for rivers and harbors submitted in House Document No. 1120, 60th Congress, Second Session, with a view to securing a permanent navigable channel six feet in depth, and to conform to the character and methods of improvement of said river, now defined and proceeding under existing law."

Pursuant to that act the War Department let contracts for the construction of dikes and revetments, and as a part of the program, two contracts were let to the respondent to build certain dikes and revetments in the river. The contracts are Exhibits 9 and 10 and are shown in the record beginning on page 69. Pursuant to those contracts, and in strict conformity therewith and under governmental supervision, respondent constructed (among others) two dikes, one upstream and one across stream from plaintiffs' accreted land. The effect of these

dikes was, during a course of about three years (Tr. 10), to gradually return the current of the river to a place it had but a few years prior thereto occupied (Tr. 46, 47) thereby, in accordance with Congressional mandate, "securing a permanent navigable channel." The land eroded was low sandbar land (see petitioners' map and testimony of witness Shannon, county surveyor, Tr. 46, 47). The petitioner, Lawrence Yearsley, testified that the land was in pasture, sweet clover and corn. On cross examination and by documentary evidence produced by the county surveyor, his testimony was overthrown. The petitioners never did live upon the accreted land as stated in petitioners' brief, page 5. They lived on the "deeded" land.

In 1928, Lawrence Yearsley, George Yearsley and a brother-in-law, Stephenson, bought what was known as the "deeded land" consisting of 250 acres at a referee's sale after Yearsley's father's death. Section 31, in which the 250 acres of "deeded land" is located, is shown on defendant's Exhibit 7 (Tr. 113). The two dikes in question, namely 602.7 with its trailer dike 602.7a, and 601.9 and the proposed channel of the river, are also shown in the exhibit. The river at the point in question has never remained in any one place for any great length of time (see plaintiffs' Exhibit 1, Tr. 46, defendant's Exhibit 2, Tr. 57, defendant's Exhibit 3, Tr. 59, defendant's Exhibit 5, Tr. 65, defendant's Exhibit 7, Tr. 113 and testimony of Charles Shannon, county surveyor, Tr. 45 to 68).

The construction of the two dikes in question was commenced in the spring of 1934 and the erosion was not completed at the time of the trial in May, 1938. The general construction of the dikes began with a bank head or paved slope similar to a revetment, on the Iowa side of the river, then a lumber mattress was woven for the entire length of the dike and was sunk to the bottom of the river with rock and then piling was driven in clusters or clumps of three through the foundation mattress in

two rows of two or three piles, so that the dike is composed of a series of clumps of piling, which are spaced a definite distance apart, each clump being cabled together with steel cable and each row of piling is fastened together with a stringer piling (Tr. 96). There was some paddle washing by boat at the end of dike 602,7a which was to aid the natural erosive process of the river.

There was a judgment for the petitioners for $806.00, which on appeal was reversed by the Eighth Circuit Court of Appeals on the ground that "the United States is not responsible to riparian owners for consequential damages for the deflexion of waters by reason of structures lawfully constructed in aid of navigation." 103 F. (2d) 593. Therefore, it was held that the District Court should have directed the verdict in favor of the contractor.

SUMMARY OF ARGUMENT.

I.

The title of petitioners to the accreted land on the navigable stream was subservient to the paramount right of the Government to improve the river for purposes of navigation.

Bedford v. *United States*, 192 U. S. 217.
United States v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53.
Jackson v. *United States*, 230 U. S. 1.

II.

The United States Government has the right to direct and change the channel of the Missouri River within its watercourse when done for the purpose of improving the navigation of the river.

United States v. *Chandler-Dunbar Water Power Co.*, *supra*.
South Carolina v. *Georgia*, 93 U. S. 4.
High Bridge Lumber Co. v. *United States*, 69 Fed. 320.

III.

Damages to or destruction of accreted land, which lies below the secondary or ordinary high water bank, from erosion as the result of dikes erected by or under the authority of the Government for purposes of improving the river for navigation is not "taking" of property within the Fifth Amendment.

Omnia Commercial Co. v. *United States*, 261 U. S. 502.
Chicago, B. & Q. R. Co. v. *People of State of Illinois ex rel. Drainage Com'rs*, 200 U. S. 561.

Mullin Benevolent Corp. v. *United States*, 290 U. S. 89.
Bedford v. *United States*, 192 U. S. 217.
Gibson v. *United States*, 166 U. S. 269.
Jackson v. *United States*, 230 U. S. 1.
Willink v. *United States*, 240 U. S. 572.
Darling v. *City of Newport News*, 249 U. S. 540.
Scranton v. *Wheeler*, 179 U. S. 141.
Barr v. *Spalding*, 46 F. (2d) 799.
Franklin v. *United States*, 101 F. (2d) 459.
South Carolina v. *Georgia*, 93 U. S. 4.

The authorities upon which Petitioners rely are distinguished from this case.

IV.

Since the United States is not responsible for the incidental and consequential damages resulting from the improvements of the river for navigation, the respondent, having acted in the capacity of agent for the United States, is likewise not responsible.

Scranton v. *Wheeler*, *supra*.
Northern Transportation Co. v. *City of Chicago*, 99 U. S. 635.
United States v. *Spearin*, 248 U. S. 132.
Converse v. *Portsmouth Cotton Oil Refining Co.*, 281 Fed. 981.
Compagnie Duport de Rio de Janeiro v. *Mead Morrison Mfg. Co.*, 19 F. (2d) 163.
Evans v. *Massman Const. Co.*, 122 S. W. (2d) 924.

BRIEF AND ARGUMENT.

I.

The title of petitioners to the accreted land on the navigable stream is subservient to the paramount right of the Government to improve the river for purposes of navigation.

It is of paramount importance to bear in mind that all of the land washed away by the river was recently accreted soil. When the Yearsleys started their suit, they claimed that the defendant had destroyed a part of their "deeded" land, but after the case was under way and it became apparent that no part of the "fast land" was taken, they amended their petition by alleging that the land eroded by the action of the river consisted of accretions to the "deeded land" (Compare paragraph 2 of the amended petition, Tr. 10, and motion to amend, Tr. 158, and leave to amend, Tr. 164).

Attention is directed to this fact because it conclusively demonstrates that the accreted land was considered only a part of the bed of the Missouri River by all parties concerned. The county surveyor's plat (defendant's Exhibit 5, Tr. 65) shows that in 1912 and again in 1917, the river had so far encroached upon the deeded land that the entire east line thereof was in the river. In connection with that exhibit, the county surveyor testified that he surveyed the land in 1912 when the Yearsleys' father bought it, and at that time the west bank of the Missouri River was partly or wholly west of the east line of the Yearsley deeded tract (Tr. 67). Plaintiffs' Exhibit 1, the map prepared by plaintiffs' witness, the county surveyor and certified to by him as such, establishes the fact that in 1928, the river was not only upon practically all of the accreted land, but encroached upon the

deeded land. The exhibit likewise shows the river bank in 1935 to have been but a very short distance east of the deeded land at the north line.

The county surveyor testified that the locations of the sandbars and willow patches shown upon the plaintiffs' Exhibit "1" were taken from the 1930 Government airplane maps (Tr. 46). From a study of this map in connection with the testimony of the plaintiffs' witness, the county surveyor, it is made to conclusively appear that all of the recent encroachment of the river has been solely upon a sandbar constituting a part of the bed of the river. The positive and uncontradicted evidence is that the stabilized channel of the river will run in a southeasterly direction from approximately the northeast corner of the Yearsley deeded land and will add to the tract a large amount of fixed and substantial land which in the past has been dominated by the vagaries of the river.

The county surveyor, by his duly certified plat (defendant's Exhibit 2, Tr. 57) conclusively establishes the fact that in 1923 the river was upon the deeded land at the southeast corner, and at that time was within 222 feet of the northeast corner of the tract. *The same exhibit describes all of the land between the west bank of the Missouri River and the east line of the deeded land at that time to be ten acres of accretions.*

It is important to attend to the fact that the special county map of Otoe County (defendant's Exhibit 4, Tr. 61) which was made in 1929 shows the meander line of the west bank of the river in 1856, at which time practically all of the deeded land was in the river. It is a singular fact that none of the accretion land was shown to have ever been deeded or conveyed by or to anyone at any time. The Government 1930 airplane photographic survey (Exhibit 7, Tr. 113) where Section 31 has been superimposed upon the map, shows that the river was being stabilized or made permanent in its old water course. By Exhibit 12 shown in the transcript at page

93, we have a true picture of this river as it was in 1930. The proposed dikes 601.9 and 602.7 and 602.7a are shown. The exhibit clearly shows that the land in question was but a part of the river bed. Moreover, it is important to remember that the improvement of the river was authorized in 1927. It takes time for the Government machinery to get in operation. If the contractor had gone upon the river in 1928 after the improvement had been authorized, and if the Government had stabilized or made permanent the channel in its then location, part of the river would today be upon the "deeded land." This fact is not susceptible of refutation.

In view of these considerations, the question of the right of the United States to make permanent the channel of the river in the manner proposed and shown by the maps in the record is not subject to serious question.

The facts recited give force to that rule of law stated by this court in *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53:

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. It is a title which inheres in the ownership of the shore; and, unless preserved or excluded by implication, passes with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers."

In *Bedford* v. *United States*, 192 U. S. 217, it was contended by the riparian proprietor that he was entitled to the unrestrained operation of natural causes, and that works of the Government which resist or disturb those causes, if injury results, have the effect of taking private property for public uses within the mean-

ing of the Fifth Amendment to the Constitution. This court emphatically denied that contention, saying:

> "The principle contended for seems necessarily wrong. Asserting the rights of riparian property, it might make that property valueless. Conceding the power of the Government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility."

In *Jackson* v. *United States*, 230 U. S. 1, it was held:

> "It is not averred that the land of the claimants bordering on the east bank of the river, in the absence of all levees, and in a state of nature, would not, in seasons of high water, be overflowed; and, if it had been so alleged, it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain, and thus all progress and development be rendered impossible."

While it is true that the Yearsleys had sufficient title to the accretions to withstand the claims of third persons, yet, many times in the past when the river flowed over the very place where the accretions were later built up, the Yearsleys had no right to claim that the Government could not, at any of those times, have stabilized the river at that particular place, so that the soil would never have accreted to any land on the shore. The conclusive evidence of the meandering of the river from time to time over the particular place in question, is ample authority for saying that the land in question is but the bed of the river. By "stabilizing the channel," the Government was only making the river permanent in a place where once it had been, and thus make it better for navigation and commerce between the states. The purpose of stabilizing the river was not to make it enter or cut a new course, but merely to prevent its changing from place to place.

As the title of the Yearsleys to the accretion land was subservient to the changing course of the river, certainly to that extent, it was subordinate to the power of the Government to use it in the improvement of the river for commerce.

II.

The United States Government has the right to direct and change the channel of the Missouri River within its watercourse when done for the purpose of improving the navigation of the river.

The Congress of the United States, in the exercise of its power to improve navigation for commerce between the states, declared the necessity of the improvement and the necessity of securing a permanent navigable channel six feet in depth (69th Congress, Chapter 47, page 1010, January 21, 1927) in the following language:

> "Missouri River, between Kansas City, from the upper end of Quindaro Bend, and Sioux City, Iowa, in accordance with the report of the Board of Engineers for Rivers and Harbors submitted in House Document numbered 1120, Sixtieth Congress, second session, with a view to securing a permanent navigable channel six feet in depth and to conform to the character and methods of improvement of said river, now defined and proceeding under existing law."

Nowhere in the act was any provision made for the condemnation of any property or to make payment for any consequential injuries which might be incurred by the work. It has been said by this court that in such grants of power, a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but it also may be withheld. Being a creature of the statute, it has no existence without it (*Transportation Co.* v. *Chicago*, 99 U. S. 635, l. c. 640).

It is clear that Congress recognized the characteristics of the Missouri River, and indeed, in House Document No. 1120, 60th Congress, second session, Congress had much evidence before it of the peculiarities of the river and the necessity of securing a permanent navigable channel. In the letter from the Secretary of War to the Congress of the United States (House Document No. 1120, 60th Congress, second session, page 19), it is said:

> "The Missouri is one of the most destructive streams on the globe. The conditions of flow on the Missouri are such that any point thrust out to hold or thwart the river may be injurious to regulation."

In fact, this court has taken notice of the traits of the Missouri River in the cases of *Jeffries* v. *East Omaha Land Co.*, 134 U. S. 178, l. c. 189, and *Nebraska* v. *Iowa*, 143 U. S. 359, l. c. 367, and officially knows that the course of the river is tortuous, the current rapid, the soil soft, sandy loam unprotected from the action of water either by rocks or the roots of trees; the effect being that the river cuts away its banks sometimes in a large body, and makes for itself a new course, while the earth is almost simultaneously deposited elsewhere and new land is formed almost as rapidly as the former bank is carried away.

The Encyclopedia Britannica writes the public record of the Missouri River in the following way:

> "Below Great Falls the slower current is unable to carry all the silt brought down from the mountains and plains, and consequently a winding and unstable channel has been formed on deep deposits of silt. Bends in the river continue to develop by erosion until the neck between two of them is cut off, and in the process numerous islands, sand bars and crescent shaped lakes are formed. Cottonwood, willow, cedar and walnut trees grow upon the banks that are for a time left undisturbed, *but years later, the eroding current returns to undermine these banks and the trees fall in and are carried downstream as snags,*

which are especially dangerous to navigation" (Italics supplied). See The Encyclopedia Britannica, Fourteenth Ed., Vol. 15, pages 614, 615.

The foregoing is the true picture of "The Big Muddy" known to every school child in the country.

Plaintiffs had no right to expect that the river would remain in any location for any period of time. Not an inch of land has been taken from them that was not a part of the original river bed.

In considering this issue, the following question presents itself:

Where was the watercourse of the river?

This improvement work was authorized in 1927. The contractor actually started the work in 1934. Is the watercourse at the location of the river as it was when the improvement was authorized? Is it where the water was flowing at the time the work was commenced? Everyone knows that before any improvement work is to be undertaken, surveys must be made, plans must be drawn, specifications must be made and contracts must be let, all of which require time. It would seem to be an unreasonable restraint upon the power of the United States Government in improving a navigable river to say that the work must be conducted only where the water flows on the very day when the work is actually undertaken.

The cases upon which the petitioners rely do not in any sense involve the questions of fact presented in this case, as we shall point out herein.

In *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, this court said:

> "This title of the owner of fast land upon the shore of a navigable river to the bed of the river * * * is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That

power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution, are admissible. If in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use. * * *

So unfettered is this control of Congress over navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive. Such judgment and determination is the exercise of legislative power in respect of a subject wholly within its control."

The power to improve navigation includes the power to divert a navigable stream by the closing of one of its channels. The case of *South Carolina* v. *Georgia et al.*, 93 U. S. 4, holds that Congress has power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of the river, rather than the other one. We quote from the opinion as follows:

"It is not, however, to be conceded that Congress has no power to order obstructions to be placed in the navigable waters of the United States, either to assist navigation, or to change its direction by forcing it into one channel of a river rather than the other."

To assert that before the Government could remove a sand bar from along the shore, it must go into court in condemnation proceedings and pay the riparian owner damages, is to deny the Government the power to keep the river open for navigation.

III.

Damages to or destruction of accreted land, lying below the secondary or ordinary high water bank, from erosion as the result of dikes erected by or under authority of the Government for purposes of improving the Missouri River for navigation is not "taking" of property within the Fifth Amendment.

The main question to be determined is, whether the evidence shows a taking of petitioners' property within the meaning of the Fifth Amendment as interpreted by this court, or whether it shows merely incidental or consequential damage for which no recovery may be had.

The evidence conclusively shows that the waters of the Missouri River, since the first survey in 1845 to the present time, have meandered over vast areas at this particular location and over practically the entire tract of deeded land. Indeed, according to the testimony and the official maps and surveys made by the county surveyor, which are generally held to be presumptively true and correct, a substantial portion of the deeded land was under the waters of the Missouri River in 1912, 1917 and 1928 (Defendant's Exhibit 5, Tr. 65). The positive and undisputed evidence—and the only evidence on the question—is that the west bank line of the river, when the improvement is completed, will be east of the secondary bank (see testimony of Capt. Loper, Tr. 121, and Area Engineer Cook, Tr. 126, O'Rourke, Tr. 144, Shannon, Tr. 67).

It is to be remembered that not one foot of the deeded land had been taken at the time of the trial, and while the county surveyor testified that the purposed revetment line would impinge upon the deeded land to the extent of 163 feet at the northeast corner, the plaintiffs have no right to claim any damage on that score, because the river had not reached that point when they sold the land.

One must not lose sight of the distinction between a taking of property by the Government for its use, and mere damage to it.

In *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, the court says:

> "If, under any power, a contract or other property is taken for public use, the Government is liable; but, if injured or destroyed by lawful action, without a taking the Government is not liable."

See: *Chicago, Burlington & Quincy Railway* v. *People of the State of Illinois*, 200 U. S. 561. (This latter case reviews at some length the authorities relating to "taking.") See also: *Mullin Benevolent Corp.* v. *United States*, 290 U. S. 89.

It is well settled that the United States has plenary power to legislate for the benefit of navigation and is not liable for remote or consequential damages caused by work constructed to that end. Riparian ownership is subect to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard.

Bedford v. *United States*, 192 U. S. 217.
Gibson v. *United States*, 166 U. S. 269.
Jackson v. *United States*, 230 U. S. 1.
Willink v. *United States*, 240 U. S. 572.
Darling v. *City of Newport News*, 249 U. S. 540.
Scranton v. *Wheeler*, 179 U. S. 141.

The cases of *Bedford* v. *United States*, *Gibson* v. *United States*, and *Jackson* v. *United States*, *supra*, are particularly applicable to the case at bar and seem to be decisive of it.

In the Bedford case, it was shown that prior to 1876, the Mississippi River flowed around a narrow neck of land known as DeSoto Point, which finally became so narrow by erosion that the river broke through leaving

the Point as an island, resulting in diverting the channel away from Vicksburg, thereby impeding navigation to the docks and wharfs. To improve the situation and divert the water back toward Vicksburg, the Government constructed revetment on the opposite side of the river which prevented further erosion and also diverted the current to the opposite shore. The diversion of the current resulted in eroding hundreds of acres of claimants' land. For that damage they brought the action. This court held that even though it be conceded that the revetment directed the course of the river against claimants' land and destroyed it, nevertheless, the Government, clothed with the power to improve the river for purposes of navigation, could construct works along the shores and in the bed of the river which might cause indirect or consequential damage to riparian landowners below the work, and yet be immune from damages therefor. It was held that the work did not constitute a "taking" within the Fifth Amendment.

Now, the facts in the instant case are that the dikes were erected on the Iowa side of the river to prevent the erosion of that bank and divert the course of the stream back to where it was and had been many times before.

It must be conceded that the Government had the right to stabilize the bank of the river. The channel could have been stabilized in 1912 at its then location, and had it been so improved, not only all the accretion lands would have been submerged, but a substantial portion of the "deeded" land would also have been taken. The same situation is true of the year 1917, and again in 1928.

Upon the authority of the Bedford case, the ruling here should be for the respondent.

The facts in the *Gibson case, supra,* are that the United States, by the construction of a dike in the Ohio east of the claimant's farm, substantially destroyed a boat

landing which had been established and maintained for a period of time by the claimant on her farm, which fronted on the river, and, by the destruction of the boat landing, caused her land to depreciate in value. This court held that this did not constitute a taking within the meaning of the Fifth Amendment of the Constitution, but was the incidental consequence of the lawful and proper exercise of a governmental power. In so holding the court said:

> "The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power. * * *
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

In the *Jackson case, supra,* the holding is that the United States is not responsible for damages by overflow, or for failure to construct additional levees along the Mississippi River valley so as to afford increased protection from increased over flow caused by the levees that were constructed by state and federal authority at other points, and that such damages thus resulting do not amount to taking the land so overflowed for public use within the meaning of the Fifth Amendment. It will be noted that in the case the damage was to land on the east side of the river caused by levees constructed upon the west side of the river. The factual situation is similar to the case at bar except that the damage resulted from the construction of levees instead of dikes. It is further stated in this decision that an individual owner has no

right to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible. The court further laid down the rule that the United States has plenary power to legislate for the benefit of navigation and is not liable for remote or consequential damages caused by works constructed for that purpose.

It has been held in *Barr* v. *Spalding*, 46 F. (2d) 799, that riparian rights exist, and have their origin, not in the ownership of the bed of a stream, but in the ownership of the upland or fast land contiguous to the stream; and that riparian owners have title to that portion of the bed of the stream above low water mark. "This title, however, is not an absolute one, but a qualified one, being subject to the paramount power of the national Government to control, and, within the limitations of the Fifth Amendment, improve same for navigation purposes."

The Fifth Amendment specifically protects against a "taking" which necessarily involves an actual appropriation by a direct physical invasion of the property, authorized, contemplated and necessarily anticipated as a part or result of the work done. It involves the assuming of possession as distinguished from an anticipated damage to the property through some act of the agents or representatives of the Government in the course of their work. If the act done which resulted in damage does not amount to the divesting of the possession of the owner by the Government, and the vesting of the possession of the property actually or constructively in the Government, then there is no violation of, nor the "taking" of property within the Fifth Amendment. It is significant that while the Government has built many dikes in many navigable streams, the books show few cases against the Government for damages resulting from the construction of such dikes and in no case has any recovery been allowed for damages resulting from the

change of the current of a navigable stream caused by a dike.

The well considered opinion of the Court of Appeals in the case of *Franklin* v. *United States*, 101 F. (2d) 459, is in exact harmony with the decisions of this court and as the facts in the case are quite similar, the ruling should be sustained.

It is of extreme importance to the Government that the doctrine of these cases be not abandoned. Millions have been spent upon our rivers in recent years to improve inland waterways. Not one dollar has ever been allocated to pay for accreted sand bars like that involved in this case, and yet, the records of the War Department show that in making a permanent channel for navigation, millions of acres have been eroded on one side of the stream and added to the other side. The value of land on both sides of the river has been greatly increased as a result of "stabilizing" the current.

To overthrow the decisions of this court upon which the Government relied in undertaking these important improvements would be to inflict a death blow to this necessary work, which although well begun is not finished and would likewise bring financial ruin upon every contractor engaged in the work.

The river gave to petitioners that which it took away. Their right to the use and ownership of the accretions was always subject to the vagaries of the river. The land was literally "here today and gone tomorrow." A study of the Government map (defendant's Exhibit 7, Tr. 113) in connection with the county surveyor's map (defendant's Exhibit 5, Tr. 65) tells the tale of the course of the river since 1845. By the Government map, we see the bank lines of the river in 1845 and 1856. By the Thalweg survey, we see the course of the river in 1890. By the county surveyor's maps we see the river as late as 1928 still pushing back west far enough to consume a part of the "deeded land." Here we have a true picture of the "river bed." Must the Government pay

the riparian landowner (sandowner) for the right to command the waters, "Peace, be still"?

Petitioners' Cases Distinguished.

Petitioners rely primarily upon *Pumpelly* v. *Green Bay Co.*, 80 U. S. 166; *United States* v. *Lynah*, 188 U. S. 445, and *United States* v. *Cress*, 243 U. S. 316.

(1) The *Pumpelly case, supra,* may not be considered as an authority for these reasons: (a) The facts are in no way analogous. There was no question of the location of the bed of the river or what constituted it. There was no question of locating a permanent channel. There was no question of merely eroding accreted sand bar land. The complaint was against a dam thrown across a river which caused a flooding of "fast land," which had not previously been in the water course. (b) The court construed a state constitutional provision as that constitution had been interpreted by the Supreme Court of the state:

> "As it is the Constitution of that state we are called upon to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight, if not conclusive on us" (l. c. 180).

The opinion was especially limited in its pronouncement to the particular case:

> "Beyond this we do not go, and this case calls us to go no further" (l. c. 181).

(c) The case has been referred to by this court as "extreme." In *Transportation Co.* v. *Chicago*, 99 U. S. 635, l. c. 642, the court, in speaking of the broad powers of the Government to improve its commercial highways without hinderance by compensation for consequential damages, and referring to the Pumpelly case, says:

"The extremest qualification of the doctrine is to be found, perhaps in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166."

Therefore, its doctrine should not be extended.

(2) The *Lynah case, supra,* should not be applied for these reasons: (a) Again, the facts are not sufficiently analogous. There a dam was thrown across the river and the natural level of the river was artificially raised and backed up on the land. The fact that the land had been conveyed and owned by various persons since 1736 and cultivated as a rice plantation for more than 70 years (Findings III and IV) conclusively shows that the plantation consisting of 420 acres was "fast" land, and that the river had not meandered over it. (b) It is impaired by a strong dissent. (c) It has been distinguished in subsequent cases. (*Bedford* v. *U. S.*, 192 U. S. 217.)

(3) *United States* v. *Cress, supra,* recognizes the application of the rule for which we contend, but the case is to be distinguished from this case in that it involves the question of the power of the Government to dam up a river and flood lands upstream and tributary to the mainstream, to the damage of riparian owners without being liable for the damage so caused. The court clearly marked the boundary of liability for compensation by reference to the Bedford, Jackson and Gibson cases, excluding such works from the class calling for damages, and *artificial back water* cases. The latter class is declared to be *direct invasion*, because the flow of the stream is stopped and the water backed up so as to inundate lands *not a part of the bed of the stream.* The case has been well distinguished in the opinion of the Court of Appeals in the *Franklin case, supra.* It is likewise distinguished by the Court of Appeals in this case.

IV.

Since the United States is not responsible for the incidental and consequential damages resulting from the improvement of the river for navigation, the respondent, having acted in the capacity of agent for the United States, is likewise not responsible.

There was no duty on the contractor to protect the Yearsleys from damages by reason of erosion to petitioners' land caused by work of the United States Government in improving the Missouri River for navigation.

Everything the contractor did in and about the construction of dikes in question was done under the orders and supervision of the Government through its engineers.

The contractor, therefore, is immune from a damage action on account of the work.

In doing the work complained of, and which the Yearsleys charge caused their damage, the contractor was engaged in the performance of public work for the United States, acting for the Government, and doing the work in accordance with certain contracts entered into between it and the Government (Tr. 69, 70 *et seq.*). The work was done in accordance with the plans, drawings and specifications so provided and made a part of the contracts (Tr. 99). The contracts provided that the Government could, at any time by wrtten order, make changes in the drawings or specifications, and that the contractor must proceed with the prosecution of the work regardless of the changes (Tr. 71). The contracts also provided for complete inspection by the Government of all material and workmanship (Tr. 72, 73), and provided that Government inspectors should at all times be permitted to inspect and test the material and work as the project progressed (Tr. 84). Accompanying the contracts and in connection with the plans and specifications were maps and drawings showing the exact location and size of the dikes to be constructed. The contracts contemplated that it was the spirit and intention of the specifications and

plans to secure for the United States the work described, complete in every respect, and the general conditions thereof complied with, whether items were specifically mentioned or not (Tr. 80). The contracts further provided that the work was to be conducted under the general direction of the contracting officer of the Government (Tr. 84) and that the Government reserved the right "to make such changes in the execution of the work to be done under these specifications as in the judgment of the contracting officer may be necessary or expedient to carry out the intent of the contract" (Tr. 85).

It must be borne in mind that in doing this work, the respondent was not an independent contractor, but a mere servant under complete domination and subject to minute supervision by the United States Government through the United States engineers by reason of the existing contract, and the reservations therein made. It is not claimed by the Yearsleys, nor can it be claimed on this record, that respondent did anything not directed by the United States engineers.

The rule, as to liability of agents designated by the Government to perform work of a Governmental nature, is definitely set forth in *Scranton* v. *Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48. In that case the court said:

> "In our opinion, it was not intended that the paramount authority of Congress to improve the navigation of public navigable waters of the United States should be crippled by compelling the Government to make compensation for the injury to a riparian owner's right of access to navigability that might incidentally result from an improvement ordered by Congress. * * * *Consequently, the agents designated to perform the work ordered or authorized by Congress, had the right to proceed in all proper ways without taking into account the injury that might possibly or indirectly result from such work to the right of access by riparian owners to navigability*" (Italics ours).

In the case of *Northern Transport Company of Ohio v. City of Chicago*, 99 U. S. 635, the City of Chicago was being sued for damages for obstructing and depriving plaintiff of the use of its warehouse while putting in a tunnel under the Chicago River along LaSalle Street. The City of Chicago was the agent of the State of Illinois, and was performing a public duty imposed upon it by the State Legislature in doing the work. It was held that acts done in the proper exercise of governmental power and not directly encroaching upon private property, though their consequences might impair its use, were universally held not to be a taking under the constitutional provision and did not entitle the owners of such property to compensation from the state or its agents or give to such plaintiff any right of action. We quote from that opinion as follows:

> "The State holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for a consequential injury resulting from the State's action through its agents, if there be any, must be that, and that only, which the Legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an

immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations, page 542 and notes."

To like effect are *United States* v. *Spearin*, 248 U. S. 132; *Converse* v. *Portsmouth Cotton Oil Ref. Co.*, 281 Fed. 981, and *Evans* v. *Massman Const. Co.*, (Mo.) 122 S. W. (2d) 924.

CONCLUSION.

The damages assessed in this case are small, but the "*indirect and consequential*" damages which might flow from an erroneous result would be great indeed. Actually the improvement of the river inures to the benefit of every riparian "*sandowner.*" The Yearsleys are not contributing any land to the improvement of navigation. As against the claims of the river they had no title. Neither had they any title to assert against the Government in its improvement and stabilization of the channel of the river. Having had nothing, they lose nothing.

On the other hand, if the work of the Government is to be impressed with the burden of condemnation proceedings and payment for these indirect and consequential damages that result as an incident of *riparian ownership*, and which the landowner assumed when he took title to riverbottom land, then, indeed, the burden will be great.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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